

**M/S. Rama Panel Pvt. Ltd. and ors. Vs. S.Shankar and anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/1161674](http://sooperkanoon.com/1161674)

**Court :** Delhi

**Decided On :** Aug-07-2014

**Judge :** Pradeep Nandrajog

**Appellant :** M/S. Rama Panel Pvt. Ltd. and ors.

**Respondent :** S.Shankar and anr.

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment Reserved on: August 05, 2014 Judgment Delivered on: August 07, 2014 FAO(OS) 461/2013 S. SHANKAR & ANR. Represented by: ..... Appellants Mr.N.Srinivasan, Attorney versus M/S. RAMA PANELS PVT. LTD & ORS. .... Respondents Represented by: Mr.D.K.Malhotra, Advocate with Mr.Rajesh Kumar Malhotra, Advocate FAO(OS) 47/2014 M/S. RAMA PANEL PVT. LTD. & ORS. .... Appellants Represented by: Mr.D.K.Malhotra, Advocate with Mr.Rajesh Kumar Malhotra, Advocate versus S. SHANKAR & ANR. Represented by: ..... Respondents Mr.N.Srinivasan, Attorney CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA PRADEEP NANDRAJOG, J.

1. S.Shankar and his wife Rajalakshmi are the owners of a flat at the rear of the first floor of property bearing Municipal No.M-78, Greater Kailash, part II, New Delhi. Sh.N.Srinivasan is the father of S.Shankar and holds a power of attorney in his favour executed by his son and his daughter-in-law and under said power of attorney is authorized to act on behalf of his son and daughter-in-law with respect

to their flat. M/s.Rama Panels Pvt. Ltd. is a company registered under the Companies Act, 1956.

2. Under a duly registered lease and a license agreement dated November 17, 2005 the flat was let out/licensed to Rama Panels for a period of eleven months on the express term that the property shall be used for the residence of any director or officer of the company. License fee/rent payable was `20,000/- per month. There was a supplementary agreement of even date as per which Rama Panels was to pay to their landlords `2,500/per month for certain services. The agreement was extended from time to time on the same terms save and except those of the supplementary agreement concerning payment of money for services. Said amount was enhanced and on the terms of the contract last entered into stood increased to `5,000/- per month.

3. Asserting that the possession of the company became unauthorized on August 08, 2008 and relying upon the term of the agreement that if the company did not vacate the premises by the stipulated date it would be liable to pay license fee at a penal rate of `2,000/- per day, a suit was filed by S.Shankar and Rajalakshmi praying for a decree for possession and damages in sum of `2,32,600/- which were calculated on the basis of the term of the agreement that for overstay beyond the agreed period the company shall pay penal license fee @ `2,000/- per day. Damages pendente lite were also claimed. In paragraph 16 of the plaint S.Shankar and Rajalakshmi pleaded as under:

16. That as per the above contention it is quite clear that the defendants, intentionally and deliberately, are neither vacating the suit premises nor paying the penal charges as demanded by the plaintiffs. The plaintiffs have come to know that the defendants have started using the suit premises as regional office of the Defendant No.1. The plaintiffs are not aware the exact time since when the defendants had started using the premises as commercial. The plaintiffs are making the enquiry and reserves their right to claim the mesne profit, unjust enrichment, seeking direction to render of the account in subsequent suit. The plaintiffs are moving an application U/o 2 Rule 2 seeking permission from this Honble Court to file the appropriate suit against the defendants after getting all the

relevant information.

4. Along with the suit, an application under Order 2 Rule 2 of the Code of Civil Procedure, 1908 was filed praying that S.Shankar and Rajalakshmi be granted leave to initiate an appropriate suit for recovery of mesne profits for unauthorized use and occupation of the premises and for rendering the account of the business of the company in a subsequent suit.

5. No order was passed in the said suit on the application filed under Order 2 Rule 2 of the Code of Civil Procedure, 1908.

6. The aforementioned suit was decreed on May 01, 2011 noting that the company was authorized to occupy the premises only till August 07, 2008. It was noted that possession was taken over by the landlord on May 12, 2010. Thus, the focus of the decision was on the mesne profits payable from August 08, 2008 till May 12, 2010. At the centre of the debate was : Whether the clause in the leave-cum-license agreement requiring the company to pay penal sum @ `2,000/- per day was by way of a penalty and hence not enforceable or whether it quantified a reasonable pre-estimate of the loss which would be suffered.

7. The decision was in favour of the landlord. For the 643 days i.e. the period between August 08, 2008 till May 12, 2010 it was held that the sum payable by the company to the landlords would be  $2,000 \times 643 = 12,86,000/-$ . Since  $5,00,000/-$  has been paid towards rent during this period, the suit filed by S.Shankar and Rajalakshmi was decreed in sum of  $7,86,000/-$ . While decreeing the suit the learned Additional Sessions Judge took note of the fact that S.Shankar and Rajalakshmi had filed a suit on the original side of the Delhi High Court which was registered as suit No.518/2010 praying for a decree in sum of  $30,80,000/-$  towards misuse of the premises, mesne profits, undue enrichment and other civil wrong. It was observed by the learned Additional Sessions Judge that his decision would have no bearing on the suit No.518/2010 filed by S.Shankar and Rajalakshmi on the original side of the Delhi High Court.

8. In CS (OS) No.518/2010, S.Shankar and Rajalakshmi have pleaded that the company clandestinely converted use of the property from residential to a

commercial evidenced by documents sent by the company to the Department of Trade and Taxes, Government of NCT of Delhi while obtaining D-VAT registration. In said documents the company claimed to be a tenant at the premises in question and that it was using the same as its godown-cum-office. It claimed to be paying a rent of `67,800/- per month. It has been pleaded that the company is liable to render accounts of its business because it has earned profits after misusing the subject property for commercial purposes. However, in the prayer made no relief has been claimed that the company should be directed to render accounts. On the contrary a quantified sum of `30,80,000/- has been claimed and in respect whereof the pleadings would be in paragraphs 19 to 23 of the plaint which read as under:

19. That the plaintiff is also entitled to a decree for rendition of accounts, directing, the defendants No.1, 2 and 3, to render true and correct accounts of the business run in suit premises, for the period of misuse of the property, and violation of the terms of usage, from residential purposes, to proved commercial purposes, and before that period, for unspecified period other than Defendant No.2s bona fide residential occupation, i.e. from commencement of the L&L, agreement. After the rendition of accounts, the plaintiff shall be entitled to full share, of Unjust enrichment, plus commercial compensation/license fee @ `150/- minimum per Sq Ft per month for 170 sq. yards, for defiling the suit premises, as damages, and unjust enrichment victimizing the suit premises, and, victimizing the Plaintiff. The similar premises in the same locality can fetch the rent/License fee of `-150-200 per Sq.feet if the same would be let out for commercial purposes.

20. That though the liability of Defendants, will be much higher and, greater than the claim of `1,50,000/- per month, but the Plaintiffs restrict it to the above amount, due to their inability to spend more on Court fee. The Plaintiffs have restricted their claim only to `1,50,000/- per months against the defendants towards the composite damages from 20/06/2007 to till the vacation of suit premises. The defendants are liable to pay `1,50,000/- as composite damages minus `20,000/- which was being paid by the defendants as monthly license fee from 20/06/2007 to 07/08/2008 and thereafter Plaintiff restricts its claim of `1,50,000/- minus 20,000/- which is being paid by the defendants as license fee minus `60,000/per month as claimed in the Court of Ld. ADJ.

Thus, the Defendants are liable to pay `18,20,000/- till 07/08/2008 and the Plaintiffs are claiming `12,60,000/- from 08/08/2008 to 07/02/2010 from the defendants. Thus the Defendants are liable to pay `30,80,000/- to the plaintiffs at the time of filing of this suit. The Defendants are also liable to pay future damages at the same rate in future i.e. till the vacation of the premises.

21. That it is further pointed out, that, statutory body, i.e. Dept. of Trade and Taxes, N.C.T. of Delhi, for the consequences of not getting registered under VAT levies penalty @ `1,000/- per day. Therefore, a fine of `30,000/-, for a normal month consisting of 30 days is payable by defendants, to VAT authorities, if the suit property has not been illegally misused for the registration purposes. By paying only, `20,000/- as License fee for the suit premises, for a month, the Defendants run their business, free of cost, and also get a clean `10,000 income every month.

22. That it is further pointed out that the cost saved per month to the business is as follows, by misuse of the suit property. Amounts are worked out, based on Statutory Authoritys, various Public Notifications, annexed.

1.

2.

3. 4. Saving of penalty per month Warding off imprisonment of Director up to 6 month `30,000 `1,00,000\* Seizure of Goods-taken as the same of 1 above `30,000 sealing of business premises by department `80,000 \*CTC (Cost to Company) of one director is arrived at by estimating, monthly emoluments, perquisites, allowances, expense accounts etc., where as all the Directors are liable in the matter, but cost is taken for only one.

23. That it is further pointed out that the benefits flowing from benefits of registration i.e. illegal misuse of suit property add to the cost saved per month to the business.

1.

2.

3. Credit of input tax/saving on local dealings `1,00,000\* Peace of mind as it is compulsory to comply with the law 1,00,000\*\* Better Goodwill `1,00,000\*\*\*  
\*Rendering accounts of Defendants will be conclusive but approximated here.  
\*\*Non economic estimate, as involving at least 6 employees, will be under conviction by the statutory authorities \*\*\*Rendering of accounts by defendants will be conclusive, but approximated here.

9. S.Shankar and his wife Rajalakshmi filed an application under Order 12 Rule 6 of the Code of Civil Procedure registered as IA No.13085/2011 praying therein that since Rama Panels had filed a document before the Trade and Taxes Department while seeking registration under the Value Added Tax Act, 2004 in which the company claimed to have paid rent in sum of `67,500/- per month, a decree on admission towards mesne profits should be passed in their favour. While opposing the application Rama Panels pleaded that the plaint itself was liable to be rejected inasmuch as a second suit for damages or mesne profits for the same period for which suit filed by S.Shankar and Rajalakshmi had been decreed would not be maintainable.

10. Vide order dated August 22, 2013 the learned Single Judge has neither granted a decree on admission nor has he rejected the plaint and thus Rama Panels challenges the latter part of the order refusing to reject the plaint under FAO (OS) 47/2014 and S.Shankar and Rajalakshmi challenge the first part of the order refusing to grant decree on admission under FAO (OS) No.461/2013.

11. S.Shankar and Rajalakshmi have created enough confusion in their pleadings in the suit filed by them in which the impugned order has been passed and this is the reason why we have culled out the core pleadings concerning quantification of the claim in paragraph 19 to 23 of the plaint. To understand their claim it needs to be brought out that as per the two, possession of Rama Panels became unauthorized on August 08, 2008. The two claim damages for the period post August 08, 2008. Conscious of the fact that the two have claimed damages @ `2,000/- per day i.e. `60,000/per month in an earlier suit, the two have pleaded that since the company has unduly enriched itself by using a residential premises for a

commercial purpose the company would be liable to pay at least `150/- per square foot per month to them. This would translate to `1,50,000/- per month . Setting of the rent received i.e. `20,000/- per month and further setting of `60,000/per month for the period post August 08, 2008 till possession was handed over, since said sum was already awarded to them, the two claim `12,60,000/- for the period August 08, 2008 till when the possession was handed over in May, 2010. For the period prior to August 08, 2008 they have claimed damages in sum of `18,20,000/- on the basis that they would be entitled to `1,50,000/- per month and after deducting `20,000/- per month which they had received as license fee/rent, the balance amount would be payable.

12. Now, where a tenant misuses a property, the landlord would be entitled to such damages as he would suffer as a result of the breach of the term of the lease and not the profits which the tenant would make due to misuse. The very foundation of the suit by S.Shankar and Rajalakshmi is thus without a basis. The two have not claimed that any penalty was imposed by any municipal or statutory authority on them due to the alleged misuse.

13. That apart, a claim for mesne profits beyond the period of authorized occupation has to be in one suit and it is not permissible to claim part mesne profits in one suit and part mesne profits in another suit. Similarly, it is not permissible to file a second suit claiming damages on the plea that when the first suit was filed, part damages were claimed.

14. S.Shankar and Rajalakshmi are totally confused on the scope of Order 2 Rule 2 of the Code of Civil Procedure. When they filed the first suit and claimed damages they relied upon the leave-cum-license agreement as per which penal license fee @ `2,000/- per day was payable. They claimed damages at said rate for the pre-suit period and obtained pendente lite damages at said rate when the suit was decreed on May 01, 2011. In the plaint of said suit, in paragraph 16 they pleaded that reserved the right to claim damages for the unjust enrichment made by the tenant and for which they sought leave of the Court to sue later on under Order 2 Rule 2 of the Code of Civil Procedure.

15. Their lawyer forgot to tell them that whereas different causes of action emerging from a wrong need not be included in one suit, all claims emerging from a cause of action have to be included in one suit and a second suit for a claim on a cause of action would be barred unless leave of the Court is obtained the two were not told that the words any portion of his claim in sub-Rule (2) of Order 2 refers not only to the physical quantum claimed by a plaintiff but also to the interest claimed and thus where a plaintiff who is entitled to a larger interest in the property claims only a smaller interest therein, the bar under the Rule would apply. The two were not made aware of the fact that if a claim is made with respect to a cause of action, the claim has to be full, as distinct from two claims capable of being made under a cause of action and only one claim made in a suit with leave of the Court sought to sue for the second claim. The two did not understand, or for that matter their lawyer did not make them understand, that in the first suit the Court could not have granted them leave to raise a further claim for damages and mesne profits in a subsequent suit. The power of the Court to grant leave is confined to reliefs only and does not extend to allowing a splitting up of a claim.

16. The suit filed by S.Shankar and Rajalakshmi in which the impugned order has been passed is clearly not maintainable. It hardly matters that in the first suit filed by them no orders were passed by the Court in the application under Order 2 Rule 2 filed by them. It hardly matters that while decreeing the suit filed by them the learned Additional Sessions Judge has observed that his decision would not affect CS (OS) No.518/2010 filed by them. The basis of the second suit of their being a misuse and hence their entitlement to a profit earned by the tenant is misconceived. The interwoven basis that they would be entitled to damages by way of mesne profits for the period the company occupied the property beyond contract agreed period is a claim for mesne profits which they could not have split when the earlier suit was filed for mesne profits for the same period.

17. Before bringing the curtains down formally we note that in the previous suit filed by them they have been granted mesne profits @ `2,000/per day as against agreed rent of `20,000/- per month. The penalty clause has not been held to be a penal clause by the learned Additional Sessions Judge, a reasoning which is highly doubtful. They have been recompensed @ `2,000/- per day and decree

passed in their favour from August 08, 2008 till May 12, 2010 when the property was vacated. The amount comes to `12,86,000/-.

18. There is no question of passing any decree in their favour on admission. On the contrary CS (OS) No.518/2010 filed by them is liable to be rejected as not maintainable.

19. FAO (OS) No.461/2013 is dismissed.

20. FAO (OS) No.47/2014 is allowed. Impugned order dated August 22, 2003 in so far it holds that the plaint is not liable to be rejected is set aside. CS (OS) No.518/2011 is dismissed as not maintainable.

21. Parties shall bear their own costs. (PRADEEP NANDRAJOG) JUDGE (MUKTA GUPTA) JUDGE AUGUST07 2014 mamta

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